UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DIANE P. DEMING,	:
Plaintiff,	:
	:
v.	:
	: Civil Action No. 3:03cv1225 (CFD)
NATIONWIDE MUTUAL INSURANCE	:
CO., et al.,	:
Defendants.	:

RULING ON MOTION TO REMAND

Pending is the Plaintiff's Motion to Remand Action to State Court [Doc. # 4]. For the following reasons the motion is GRANTED.

I. Background

The plaintiff, Diane P. Deming ("Deming"), brought this action in the Connecticut Superior Court by a complaint dated December 27, 2002 against Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Life and Annuity Insurance Company, Nationwide Property and Casualty Insurance Company, Nationwide General Insurance Company, Nationwide Life Insurance Company (Collectively "Nationwide"), Steven T. Miles and James U. Shortley (the "non-diverse parties"). Deming filed a seven-count amended complaint on January 27, 2003 (the "Amended Complaint"). Counts one through four were asserted against all the defendants, and counts five through seven only against Nationwide.

On July 14, 2003, the Superior Court granted, in part, a motion to strike filed by Nationwide on May 29, 2003. The court granted the motion to strike as to the non-diverse parties, Miles and

Shortley, holding that "there are no allegations supporting the legal conclusions that the individual defendants conspired with or aided and abetted [Nationwide] in committing the torts alleged in counts one through four."

Nationwide then filed a Notice of Removal with this Court on July 17, 2003, pursuant to 28 U.S.C. § 1446(b), which provides in relevant part that a notice of removal must be filed within 30 days of any order "from which it may first be ascertained that the case is one which is or has become removable." Nationwide claims that "[u]pon entry of the Order striking all of Plaintiff's claims against [Miles and Shortley], the Action became a civil action between citizens of different states, because Plaintiff's citizenship is in Connecticut and Nationwide's citizenship is in Ohio," and that this Court therefore has jurisdiction over this action pursuant to 28 U.S.C. §§ 1332[1] and 1446(b).

Deming does not contest Nationwide's allegations regarding the citizenship of the parties or the amount in controversy. However, Deming argues in her memorandum in support of her motion to remand that the case was not yet removable at the time the Superior Court granted the motion to strike as to the individual defendants because a judgment had not yet entered as to those defendants, and that they therefore remained in the case for purposes of determining whether there was complete diversity of citizenship between the parties. She also claims that, before a final judgment could have been entered in favor of the individual defendants, the Connecticut Practice Book afforded her the opportunity to attempt to amend her complaint. The Connecticut Practice Book, § 10-44 provides, in relevant part, "Within fifteen days after the granting of any motion to strike, the party whose pleading has been

---

[1]Nationwide's Notice of Removal also asserts that the amount in controversy exceeds $75,000.

stricken may file a new pleading."

II. Discussion

It is well-settled that "[t]he burden of demonstrating compliance with the removal requirements lies with the removing party, and where the propriety of removal is in doubt, doubts must be resolved against federal retention of jurisdiction." Fisher v. Building Servs.32-B-J Health Fund, No. 96 Civ. 4317(KMW), 1997 WL 590843, at *2 (Sept. 22, 1997 S.D.N.Y.) (citations omitted). See also Somlyo v. J. Lu-Rob Enters., Inc., 932 F.2d 1043, 1045-46 (2d Cir. 1991) ("federal courts construe the removal statute narrowly, resolving any doubts against removability."); 16 Moore's Federal Practice, § 107.05 (3d ed. 2002) ("[B]ecause the effect of removal is to deprive the state court of jurisdiction over a case properly before the state court, removal raises federalism concerns that mandate strict construction. . . . [A]nd uncertainties are resolved in favor of remand.").

A. Involuntary Dismissal

As a general rule, "involuntary changes in a case do not create removability if the plaintiff's complaint was not removable." 16 Moore's Federal Practice, § 107.14[2][h] (3d ed. 2002).

> If diversity of citizenship provides the jurisdictional basis for removal to federal court, the parties must be diverse not only when the petition is filed, but also when the case was first brought. . . . However, if the parties become diverse because a non-diverse defendant is dismissed from the case–as opposed, say, to a party's change in citizenship–then removal becomes possible under appropriate circumstances. *The test to determine whether dismissal of a non-diverse defendant permits removal has been articulated in terms of the plaintiff's volition in obtaining the dismissal.* If the plaintiff voluntarily dismissed the action against the non-diverse defendant, the case becomes removable. . . . However, *if the non-diverse defendant were dismissed from the case on his own motion, against the plaintiff's will, then the case would not be removable.*

LPG Gem Ltd. v. Cohen, 636 F. Supp. 881, 882 (S.D.N.Y. 1986) (citations omitted) (emphasis added). See also See also Arseneault v. Congoleum, No. 01 Civ.10657(LMM), 2002 WL 472256, at *3 (Mar. 26, 2002 S.D.N.Y.) ("The general rule is that where removal is premised on diversity jurisdiction, . . . complete diversity must exist both at the time the action is commenced *and* at the time of removal. . . . However, an exception to that general rule, under 28 U.S.C. § 1446(b) and Powers v. Chesapeake & Ohio Ry. Co., 169 U.S. 92 (1898), occurs where the plaintiff after instituting the action creates complete diversity by voluntarily dismissing the action as to the non diverse parties, in which case removal becomes proper.") (emphasis in original) (citations and internal quotation marks omitted); 16 Moore's Federal Practice, § 107.30[3][a][ii][C] ("[T]he involuntary dismissal of a non-diverse defendant by court-ordered dismissal does not ordinarily create diversity.").

In this action, there is no dispute that the non-diverse parties were not dismissed by Deming voluntarily. However, the Second Circuit has recognized an exception to the general rule that an involuntary dismissal of non-diverse defendants does not make a case removable. In Quinn v. Aetna Life & Casualty Co., 616 F.2d 38 (2d Cir. 1980), the Second Circuit stated that the "involuntary dismissal" rule did not apply where the plaintiff had elected not to appeal the involuntary dismissal of a non-diverse party:

> The district court had subject matter jurisdiction over this action despite the line of cases holding that, even under the 1949 amendment to 28 U.S.C. § 1446(b), the involuntary dismissal of non-diverse parties does not make an action removable. See Weems v. Louis Dreyfus Corp., 380 F.2d 545 (5th Cir. 1967); Squibb-Mathieson Int'l Corp. v. St. Paul Mercury Ins. Co., 238 F.Supp. 598 (S.D.N.Y.1965); 14 Wright, Miller & Cooper, § 3723. The purpose of this distinction is to protect against the possibility that a party might secure a reversal on appeal in state court of the non-diverse party's dismissal, Squibb- Mathieson v. St. Paul, supra at 599, quoting 14 Wright, Miller & Cooper, § 3723 at 595, producing renewed lack of complete diversity in the state court action, a result repugnant to the requirement in 28

> U.S.C. § 1441 that an action, in order to be removable, be one which could have been brought in federal court in the first instance. By the time Judge Sifton came to decide the removability of this case, however, the time for plaintiffs to take an appeal from the involuntary dismissal of the non-diverse defendants had long passed, and no appeal by the plaintiffs had been taken. Thus he was correct in concluding that no appeal could occur which could produce the result, described above, forbidden by the statute. Under these circumstances, plaintiffs' failure to take an appeal constituted the functional equivalent of a "voluntary" dismissal.

Quinn, 616 F.2d at 40, fn. 2.

The Quinn exception to the involuntary dismissal rule does not apply here. If Deming had filed an amended complaint in the Superior Court, as she has indicated she intended to do, the reasoning underlying Quinn would not be implicated. As noted above, the Court in Quinn held that an exception to the voluntary-involuntary rule was appropriate in part because "[u]nder these circumstances, plaintiffs' failure to take an appeal constituted the functional equivalent of a 'voluntary' dismissal." Id. The same cannot be said of the circumstances in this case. Here, Deming had a right to amend the complaint pursuant to Connecticut Practice Book § 10-44 and she has indicated that it was her intention do so within the prescribed time limit.[2] Thus, unlike the situation in Quinn, the Order dismissing the non-diverse parties here did not "constitute the functional equivalent of a 'voluntary' dismissal." Moreover, as the district court noted in LGP Gem, "[t]he determinative factor in [Quinn] was [that the dismissal of the non-diverse parties] was final." LGP Gem, 636 F. Supp. at 883. Here, the removal of the non-diverse defendants from the case had not become final at the time the notice of removal was filed, but was subject to Deming's right to amend her complaint in response to the Court's ruling on the motion to strike. See Practice Book § 10-44 ("Within fifteen days after the granting of

[2]Deming was unable to file an amended complaint with the Superior Court, however, because the case had been removed to this Court.

any motion to strike, the party whose pleading has been stricken may file a new pleading . . . [if] the party whose pleading or a count thereof has been so stricken fails to file a new pleading within that fifteen day period, the judicial authority may, upon motion, enter judgment against said party. . .”). If Deming had been permitted to do so, the result might well have been to “produc[e a] renewed lack of complete diversity in the state court action, a result repugnant to the requirement in 28 U.S.C. § 1441.” Quinn, 616 F.2d at 40, fn. 2. Thus, because the dismissal of the non-diverse parties from the case had not yet become final, the Quinn exception to the involuntary dismissal rule is inapplicable.[3]

Therefore, based on the general rule that an involuntary dismissal of a non-diverse party does not make a case removable, in combination with this Court’s conclusion that this case does not fall within the narrow exception to that rule outline in Quinn, the Court holds that this case had not yet become removable at the time the notice of appeal was filed.

B. Fraudulent Joinder

---

[3]The Court notes that there might be some confusion as to when the thirty day period for filing a notice of removal begins to run under 28 U.S.C. § 1446(b) under these circumstances. Here, for the reasons noted above, the case had not yet “become removable” within the meaning of the statute, when the ruling on the motion to strike was entered on July 14, 2003. The case could not become removable because the dismissal of the non-diverse parties could not be either “final” or “functionally voluntary” under Quinn until Deming had forgone her right to amend her complaint. Thus, the thirty-day removal period cannot begin to run until the sixteenth day after a ruling removing non-diverse parties in cases where Connecticut Practice Book § 10-44 applies (and even then, only if the plaintiff has not sought to amend).

Deming has also argued that Nationwide’s notice of removal was premature because the period for appealing the Superior Court’s order had not yet expired. However, as the Court finds that the case could not become removable pursuant to Quinn until the plaintiff had failed to exercise her right to amend under Connecticut Practice Book § 10-44, the Court need not reach this alternative argument.

In the alternative, Nationwide claims that the Court should remand because the non-diverse defendants were joined to this action solely for the purpose of defeating this Court's diversity jurisdiction. "[A] plaintiff may not defeat . . . diversity jurisdiction and a defendant's right of removal by merely joining as defendants parties with no real connection with the controversy." Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 460-61 (2d Cir. 1998). See also Otani v. State Farm Fire and Cas. Co., 117 F.3d 1425 (9th Cir. 1997) ("Normally, dismissal of resident defendants will not create diversity jurisdiction unless the dismissal was the result of a voluntary action by the plaintiff. . . . An exception to this rule exists in the case where the resident defendants are determined by the court to have been fraudulently joined.") (citations omitted);15 Moore's Federal Practice, § 102.21[5][a] (3d ed. 2002) ("In determining whether there is diversity of citizenship, the court must disregard parties fraudulently joined.").

The burden of proving fraudulent joinder rests with the removing party, who must prove by clear and convincing evidence that either 1) there is no possibility that the plaintiff will be able to state a cause of action in state court against the non-diverse party, or 2) there has been outright fraud in the plaintiff's jurisdictional pleadings. 15 Moore's Federal Practice, § 102.21[5][a] (3d ed. 2002). See also Pampillonia, 138 F.3d at 460-61 ("[T]he defendant must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility, based on the pleadings, that the plaintiff can state a cause of action against the non-diverse defendant in state court."). Furthermore, as noted above, it is well-settled that the court should analyze the pleadings in effect at the time of removal when undertaking a fraudulent joinder analysis. See Fowler, 256 F. Supp. 2d at 1246. Therefore, the Court will consider the fraudulent joinder claim

as to the Amended Complaint of January 27, 2003, and will not consider the proposed second amended complaint. Here, Nationwide claims that Deming has failed to state a valid cause of action against the non-diverse defendants in Connecticut Superior Court because of the "intracorporate conspiracy doctrine." See Harp v. King, 266 Conn. 747 (2003). In support of this assertion, Nationwide notes that the Superior Court has already granted the motion to strike the non-diverse defendants. However, to prevail on a claim of fraudulent joinder, the removing party must do more than demonstrate a probability of success on the merits; rather, it must show that there is "no possibility" that the plaintiff can state a cause of action against the non-diverse party. See Pampillonia, 138 F.3d at 460-61. See also Smallwood v. Illinois Central R. Co., 352 F.3d 220, 222-23 (5th Cir. 2003) ("The fraudulent joinder doctrine is a narrow exception to the rule that diversity jurisdiction requires complete diversity. As such, the burden of demonstrating fraudulent joinder is a heavy one. . . . [W]e examine [i]f there is arguably a reasonable basis for predicting that the state law might impose liability on the facts involved.") (citations and internal quotation marks omitted).

Nationwide cannot satisfy the heavy burden of demonstrating fraudulent joinder merely by a showing that the Connecticut Superior Court has already ruled against Deming on the merits of her claims against the non-diverse defendants.[4] "The fact that the plaintiffs may not ultimately prevail against the individual defendants . . . does not mean that the plaintiffs have not stated a cause of action

[4]If that were the case, the voluntary/non-voluntary distinction discussed above, and the Quinn exception thereto, would be meaningless. A party could simply plead "fraudulent joinder by hindsight" anytime non-diverse defendants were dismissed from the case, whether or not the dismissal was rendered the "functional equivalent" of a voluntary dismissal by the non-removing party's failure to appeal.

for purposes of the fraudulent joinder analysis. In a fraudulent joinder inquiry, federal courts are not to weigh the merits of a plaintiff's claim beyond determining whether it is an arguable one under state law." Pacheco De Perez, 139 F.3d 1368, 1380-81 (11th Cir. 1998) (citations and internal quotation marks omitted). Here, notwithstanding the Superior Court's ruling in favor of the non-diverse defendants, the Court finds that there is at least "a possibility, based on the pleadings, that the plaintiff *can* state a cause of action against the non-diverse defendant in state court." Pampillonia, 138 F.3d at 460-61 (emphasis added). The non-diverse parties in this action are not "parties with no real connection with the controversy." Id. at 461. Rather, they are employees of Nationwide and were allegedly responsible for the conduct that Deming claims harmed her. Thus, despite apparent defects in the pleadings, it is possible that Deming could state a claim that the non-diverse defendants' allegedly tortious conduct had occurred outside the scope of their employment, thereby bringing them outside the scope of the intracorporate conspiracy doctrine. Harp, 266 Conn. at 783 (holding that intracorporate conspiracy doctrine barred recovery against the individual defendants where "there is nothing in the record from which a fact finder could find" that they acted outside the scope of their employment).

Moreover, even if the Court agreed with Nationwide that Deming's Amended Complaint offered no possibility for recovery, Nationwide's notice of removal, to the extent that it is based on fraudulent joinder, is untimely under 28 U.S.C. § 1446(b). That statute requires that a notice of removal be filed

> within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . [I]f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has

become removable . . .

28 U.S.C. § 1446(b). The question for the Court is when this thirty-day removal period began to run. If the period began to run on January 27, 2003, the date that the Amended Complaint was filed, then the notice of removal was untimely, as it was not filed until July 17, 2003. However, if the period did not commence until the Superior Court's Order granting the motion to strike on July 14, 2003, then the notice was timely. "While few courts have expressly addressed the issue of when a removal notice must be filed in a case involving fraudulent joinder, most reported opinions have enforced a 30-day removal period that begins to run *from the time defendants can first ascertain that a party has been fraudulently joined*." Delaney v. Viking Freight, Inc., 41 F.Supp.2d 672, 674 fn.2. (E.D. Tex. 1999) (string cite omitted) (emphasis added).[5] Here, Nationwide has not indicated that it learned any new facts from which it could ascertain that the claims against the non-diverse defendants had "no possibility" of success between the time that plaintiff filed her complaint and the time that the Superior Court ruled on the motion to strike, other than the ruling on the motion to strike itself. However, rather than file a notice of removal within 30 days of service of the Amended Complaint, which Nationwide now claims clearly did not state even an arguable claim against the non-diverse defendants, Nationwide waited until after the state court had ruled on the merits of those claims before asserting that they amounted to fraudulent joinder. Permitting such "fraudulent joinder by hindsight" removal petitions

---

[5]But see Negrin v. Alza Corp., No. 98 CIV. 4772 (DAB), 1999 WL 144507 (March 17, 1999 S.D.N.Y) ("[T]here is authority to suggest that the time limits of Section 1444(b) may be relinquished if the joinder of the non-diverse defendant is found to be fraudulent.") (citing Costa v. Port Authority of New York, No. 95 Civ. 4749, 1996 WL 143908, *3 (S.D.N.Y. Mar. 29, 1996); Nosonowitz v. Allegheny Beverage Corp., 463 F.Supp. 162, 163 (S.D.N.Y.1978)) (unpublished opinion).

would serve both to undermine 28 U.S.C. § 1446(b)'s thirty-day limit and, as noted above, render meaningless the long-held distinction between voluntary and involuntary dismissals of non-diverse parties in creating removability. See fn.3, supra. Therefore, "[t]he [C]ourt concludes that [Nationwide] could have intelligently ascertained within the thirty days following [its] receipt of the [Amended] Complaint [whether or not] it had valid arguments that [the claims against the non-diverse parties] should fail. With such knowledge, [Nationwide's] thirty day window of opportunity to invoke federal jurisdiction on the basis of diversity and fraudulent joinder began running" with service of the Amended Complaint. Clingan v. Celtic Life Ins. Co., 244 F.Supp.2d 1298, 1308 (M.D. Ala. 2003).

Thus, the Court finds that the claims against the non-diverse defendants did not amount to fraudulent joinder, and that, even if they had, the notice of removal was not timely under 28 U.S.C. § 1446(b).

III. Conclusion

For the forgoing reasons, the motion to remand is GRANTED, and the clerk is directed to remand this case to the Connecticut Superior Court for the Judicial District of Hartford. However, Deming's request for costs and expenses incurred as a result of having to file this motion is DENIED.

SO ORDERED this ___ day of February 2004, at Hartford, Connecticut.

Christopher F. Droney
United States District Judge